

GOLIATH v MEC FOR HEALTH, EASTERN CAPE 2015 (2) SA 97 (SCA) A

SUMMARY

- A surgical swab was left in Ms Goliath's abdomen during a hysterectomy performed at a provincial hospital falling under the MEC.
- It resulted in infection and further surgery to remove the swab.
- Ms Goliath sued the MEC in delict, alleging negligence on the part of the doctors and nursing staff that performed the hysterectomy. The high court dismissed the claim despite the fact that the MEC did not adduce any evidence. In holding that Ms Goliath failed to discharge the onus of establishing negligence, the high court pointed out that it was precluded by precedent from applying the *res ipsa loquitur* doctrine in the medical-negligence field. In an appeal to the SCA.
- *Held*: The enquiry was whether Ms Goliath discharged the onus to prove her case, namely that the damage she sustained was caused by the negligence of the doctors and nursing staff in allowing the swab to be left in her.
- *Res ipsa loquitur* was merely a convenient phrase used to describe proof of facts sufficient to support an inference of negligence and thereby to establish a prima facie case against a defendant.
- It was not a magic formula and did not entail a 'shifting' of the onus or a suspension of common sense.
- Specifically, the maxim should not tempt a court to first draw an inference of negligence from the occurrence itself and then decide whether it was rebutted by the defendant's explanation.
- In the present case the high court's focus on the applicability of the maxim to medical-negligence suits had diverted it from the obvious inference of negligence dictated by Ms Goliath's evidence of the left-behind swab.
- In failing, without explanation, to adduce any countervailing evidence whatsoever, the MEC took the risk of judgment being given against him.
- In the premises the appeal would succeed.

Semble: The time may have come to drop the *res ipsa loquitur* maxim from the legal vocabulary.